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Supreme Court, U.S.
FILED
NOV 14 1997
CLERK

No. 97-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF WASHINGTON,
Petitioner,

v.

MARTIN SHAW PANG,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Fundamental to extradition law and even more basic than the Rule of Specialty is the principle that if a requested country *expressly denies* extradition on a given charge, the extraditee has standing to object to prosecution on that charge.

In this case, the United States requested Martin Pang's extradition on five counts; Brazil expressly denied extradition on four of the five counts. In holding that the State of Washington could not prosecute Martin Pang on those four counts for which extradition was denied, the Washington Supreme Court has merely given legal effect to the conditions of extradition imposed by Brazil. The questions presented are:

1. Whether a defendant has standing, under an extradition treaty, to object to prosecution on charges for which extradition was explicitly denied in the Extradition Order and for which there was no subsequent, post-extradition consent to prosecute.

2. Whether *United States v. Rauscher*, 119 U.S. 407 (1886), and basic principles of extradition law would prohibit the United States from prosecuting an extraditee on charges for which extradition and permission to prosecute were expressly requested and repeatedly denied by the extraditing country.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Martin Shaw Pang respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Washington Supreme Court's opinion in this case, 132 Wn.2d 852, 940 P.2d 1293 (1997), reproduced in Petitioner's Appendix (Pet. App.) 1a-94a, 102a-104a.

TREATY INVOLVED

The petition cites only Article XXI of the Treaty of Extradition between Brazil and the United States, as though that were the sole provision relevant to the determination of what charges Martin Pang can be prosecuted on following extradition. Article I sets forth the primary conditions under which the parties have agreed to extradite:

> Each Contracting State agrees, under the conditions established by the present Treaty and each in accordance with the legal formalities in force in its own country, to deliver up, reciprocally, persons found in its territory who have been charged with or convicted of any of the crimes or offenses specified in Article II of the present Treaty...; provided that such surrender shall take place only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his commitment for trial if the crime or offense had been there committed.

Pet. App. 107a-108a.

STATEMENT OF THE CASE

Martin Shaw Pang stands accused of setting fire to his parents' Seattle warehouse on January 5, 1995. Four firefighters who had entered the burning building died combating the fire. On May 8, 1995, the United States sent a Petition for Extradition to Brazil, where Mr. Pang had traveled in mid-February 1995. Extradition was requested on four counts of first-degree felony-murder and one count of first-degree arson. Pet. App. 6a.

In the extradition proceedings, Mr. Pang argued that the felony-murder charges were non-extraditable under the terms of the Treaty, since (a) unintentional homicide is not included in the agreement's list of extraditable offenses, and (b) dual criminality had not been established since the U.S. had presented no evidence of intent to kill, a prerequisite for murder charges under Brazilian law. Secondly, Mr. Pang asked that his extradition be conditioned on a pledge by the U.S. to honor his right to a sentencing cap of 30 years

imprisonment, a right guaranteed by Brazil's 1988 Constitution to all criminal defendants in Brazil.

On December 18, 1995, the Brazilian Supreme Court issued its Extradition Order to extradite on the arson charge, but to "exclude from the grant of extradition the charges of murder in the first degree." Pet. App. 25a. In a second vote, a different Court majority declined to impose the 30-year sentencing limit requested, ruling the U.S. was not bound to honor a Brazilian constitutional right created decades after the 1960s Treaty was ratified. Rather, U.S. courts could give Mr. Pang, if convicted of the arson, any sentence up to life imprisonment.[1] Pet. App. 25a.

The U.S. spent the next several months attempting to persuade different Brazilian officials to void their high court's ruling that the four felony-murder charges were not extraditable offenses. Pet. App. 32a-35a. In each instance, the U.S. was informed that Executive Branch officials lack authority under the Brazilian Constitution's Separation of Powers to permit the U.S. to disregard the Court Order.

First, on February 22, 1996, the U.S. formally asked Brazil's Ministry of Foreign Relations for permission to prosecute Mr. Pang on the four felony-murder charges. Pet. App. 26a. Five days later, the Brazilian Ministry officially denied the request, attaching a certified copy of the Court's Extradition Order and explaining that Brazil's Executive "does not have jurisdiction to interpret or establish limits regarding the scope of the decisions handed down by the Judicial Branch." Pet. App. 27a.

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[1] Although the death penalty was never an issue in this case, Article VI of the Treaty does bar extradition of defendants facing that sentence.

On March 1, 1996, the U.S. filed an extraordinary *Embargos de Declaração* motion in the Brazilian Supreme Court, characterizing the Extradition Order as obscure and self-contradictory. Pet. App. 27a. On March 27, 1996, Brazil's Justices unanimously denied the motion, reasserting the clarity and finality of its original decision to "exclude from the grant of extradition the charges of murder in the first degree." Pet. App. 29a-32a.

In early March 1996, U.S. Secretary of State Warren Christopher, traveling in Brazil, "personally ask[ed] the Brazilian government to extradite Martin Pang without restriction." Pet. App. 33a. In a letter dated May 21, 1996, President Clinton asked Brazil's President for leave to prosecute on the felony-murder charges. Pet. App. 40a.

Meanwhile, U.S. Justice Department officials had contacted Brazil's Minister of Justice, Nelson Jobim. On September 26, 1996, Minister Jobim responded to Attorney-General Janet Reno that Brazil's Constitution gives its Judiciary "exclusive jurisdiction" in these matters:

> Decisions granting or denying extraditions may not be appealed, and *the Executive Branch may not limit or make comments of any kind regarding the content or scope of rulings handed down by that Court, which is the highest authority of an independent branch of government. Consequently, any interpretive statement the Executive Branch might make would be unenforceable.*

Pet. App. 41a (emphasis added).

Then, in a letter dated October 29, 1996, Brazil's President responded directly to President Clinton:

> *Despite the personal interest I took in the issue,* the consideration of the alternatives at hand clearly indicated that *room for action by the Executive branch is very limited, since a decision has already been taken by the Supreme Court....* I understand [Minister Jobim's] letter provides the American government with a *broad and clear picture of the Brazilian legal position on the issue.*

Pet. App. 44a (emphasis added).

On February 21, 1997, Mr. Pang's Brazilian attorneys sent Minister Jobim a letter, placing him on notice that his letter to the U.S. Attorney-General had caused an American judge on November 12, 1996, to conclude that Brazil's Executive had implicitly granted the U.S. permission to violate the terms of the Brazilian Federal Supreme Court's Extradition Order and to prosecute Mr. Pang on the four felony-murder charges. Pet. App. 47a. Five days later, Mr. Jobim responded:

> I'd like to inform you that *at no time did I provide any type of interpretation on the content and reach of the decision passed by the Federal Supreme Court.* Thus, I ratify all the words used in said correspondence, *its only objective being to clarify* to Ms. Janet Reno, Attorney-General of the United States, some aspects of *the Brazilian Constitutional system.*

Pet. App. 48a (emphasis added).

REASONS FOR DENYING THE WRIT

Petitioner's first query seeks to characterize this case as an ideal vehicle for the resolution of a split among the federal circuits over whether an extraditee has standing to object to prosecution on charges for which extradition was not granted,

absent affirmative protest by the extraditing nation. The truth is that no U.S. federal court has ever denied an extraditee standing to challenge the prosecution of an offense in a case such as this, where extradition was specifically petitioned by the U.S. *and then expressly and repeatedly denied* by the extraditing country, both in the Extradition Order and in all subsequent communications.

Second, Petitioner urges this Court to construe the text of this particular treaty so as to allow post-extradition prosecution *on any and all charges requested in the extradition petition*—even in cases where the requested nation has expressly *denied* extradition on specific charges. Such a construction is absurd on its face, since it would render meaningless Brazil's extradition proceedings and its ruling.

Neither Question Presented raises a genuine question of law in need of clarification by this Court. Certiorari should therefore be denied.

I. SINCE THE EXTRADITING NATION EXPLICITLY AND REPEATEDLY DENIED THE UNITED STATES PERMISSION TO PROSECUTE THE EXTRADITEE ON THE FOUR CHARGES AT ISSUE, DEFENDANT CLEARLY HAS STANDING TO OBJECT TO PROSECUTION ON SAID CHARGES

A. U.S. Courts Must Enforce Any Treaty-Based Conditions Imposed by the Extraditing Nation

All the Washington Supreme Court has done in this case is to uphold one of the most elemental principles of extradition jurisprudence: that when a requested nation, pursuant to a treaty provision, *refuses* to extradite on a particular charge,

the requesting country can neither disregard[2] nor second-guess[3] that decision. As the Washington Supreme Court noted:

> We conclude without question that under the Treaty, Brazil, as the requested state, has sole authority to determine whether a particular offense is extraditable.

Pet. App. 68a.[4]

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[2] *See United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (per curium), *cert. denied*, 479 U.S. 1009 (1986) ("Because the surrender of the defendant requires the cooperation of the surrendering state, preservation of the institution of extradition requires that the petitioning state live up to whatever promises it made in order to obtain extradition."); *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2nd Cir. 1973) ("the principle [of specialty] has been extended to bar prosecution for crimes listed in the treaty but for which extradition, for whatever reason, was not granted).

[3] In *Johnson v. Browne*, 205 U.S. 309 (1907), this Court ruled that "[w]hether the crime came within the provision of the treaty was a matter for the decision of the Dominion authorities, and such decision was final by the express terms of the treaty itself." *Id.* at 316. *See also Casey v. Dep't of State*, 980 F.2d 1472, 1477 (D.C. Cir. 1992) ("This deference is necessary to further international comity—a goal the Supreme Court has emphasized in a variety of contexts."); *McGann v. U.S. Board of Parole*, 488 F.2d 39, 40 (3rd Cir. 1973) ("[*Johnson*] precludes any review of the Jamaican court's decision as to the extraditable nature of the offense"); *Greene v. United States*, 154 F. 401, 408 (5th Cir. 1907), *cert. denied*, 207 U.S. 596 ("[The treaty provision simply emphasizes] what must, upon reason and principle, be true as to the whole—that the decision of the authorities of the government in whose jurisdiction the fugitive shall be found is necessarily final... [and] the courts of this country cannot review a decision of foreign authorities against extradition").

[4] Article XI of the U.S.-Brazil Extradition Treaty expressly provides that "[t]he determination that extradition based upon the request therefor should or should not be granted shall be made in accordance with the domestic law of the requested State." Pet. App. 115a.

In the landmark extradition case, *United States v. Rauscher*, 119 U.S. 407 (1886), this Court made clear that the U.S. could not reasonably expect its own extradition orders to be honored abroad unless U.S. courts zealously enforced as the "supreme law of the land" the extradition orders of its treaty partners. *Id.* at 419 (citing U.S. CONST., art. VI, cl. 2).

This axiomatic policy of respect for restrictions imposed by extraditing countries is rooted in "principles of international comity: to protect its own citizens in prosecutions abroad, the United States guarantees that it will honor limitations placed on prosecutions in the United States"[5]—whether or not U.S. courts agree with those limitations. The fact that there are more extraditions today than four decades ago, *see* Pet. 9, simply underscores the importance of Judiciaries everywhere enforcing good faith compliance with extradition obligations.

The Rule of Specialty is designed to prevent countries from petitioning extradition on one set of charges and then later, in bad faith, prosecuting the extraditee on a *second* set of charges not raised during the extradition proceedings, as occurred in *Rauscher*.[6] The question of law in this case,

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[5] *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995) (citing *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989)).

[6] *See Rauscher*, *supra*, 119 U.S. at 422 ("[Because] it is for a limited and defined purpose that the [extradition] transfer is made, it is impossible to conceive of the exercise of jurisdiction in such as case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.").

however, is even more basic than that: Can the U.S. request extradition on one set of charges, have its request flatly *rejected*, and then, contrary to the requested country's wishes, nevertheless prosecute the extraditee *on that same first set of rejected charges*? The answer is obviously no, and no federal court has ever suggested otherwise.

Indeed, in judging the validity of post-extradition charges, U.S. case law uniformly sets forth as the "essential" judicial task "*to determine, as best one can, whether the surrendering state would regard the prosecution as a breach*" so as "*to prevent the United States from violating international obligations.*" *See Fiocconi v. Attorney Gen.*, 462 F.2d 475, 480 (2nd Cir.), *cert. denied*, 409 U.S. 1059 (1972).[7]

If an individual extraditee is deemed to have standing under the Rule of Specialty[8] and U.S. domestic law[9] to challenge

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[7] *See also, e.g., Van Cauwenberghe v. Biard*, 486 U.S. 517, 525 (1988) ("the principle operates to ensure that the receiving state does not abuse the extradition processes of the extraditing state"); *Andonian*, 29 F.3d at 1435 ("Our concern is with ensuring that the obligations of the requesting nation are satisfied."); *United States v. Sensi*, 879 F.2d 888, 895 (D.C. Cir. 1989) (holding that "the standard" is "whether the requested state had objected or would object to prosecution"); *United States v. Diwan*, 864 F.2d 715, 721 (11th Cir.), *cert. denied*, 492 U.S. 921 (1989) ("the objective of the rule is to insure that the treaty is faithfully observed by the contracting parties").

[8] The *Rauscher* Court characterized the Rule of Specialty as a "right conferred upon *persons* brought from a foreign country into this under [extradition] proceedings." 119 U.S. at 424 (emphasis added).

[9] As Chief Justice Rehnquist recently noted, this Court has ruled that a U.S. domestic statute, now codified as 18 U.S.C. §3192, imposes the Rule of Specialty on *every* extradition treaty to which the U.S. is a party. *Alvarez-Machain*, 504 U.S. 655, 660 (1992) (citing *Rauscher*, 119 U.S. at 423); *see also Fiocconi, supra*, 462 F.2d at 482.

charges not requested in an international extradition petition, as this Court found in *Rauscher*, then, *a fortiori,* an extraditee has standing to challenge charges requested *and denied by the requested country*. The Court made this very argument in *Johnson v. Browne*, 205 U.S. 309 (1907):

> While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then punish him for another and different offense. *Especially should this be the case where the Government surrendering the person has refused to make the surrender for the other offense on the ground that such offense was not one covered by the treaty.*

Id. at 321 (emphasis added).

B. The Difficulty in This Case Has Not Been Brazil's Failure to Make Its Position Clear, But Refusal by U.S. Officials to Accept It

As the Statement of the Case above makes clear, Brazil has steadfastly held that the four felony-murder charges are not extraditable offenses under the terms of the U.S. Brazil Extradition Treaty. Brazil said no during the extradition proceedings and post-extradition when the United States continued efforts to pressure Brazilian officials into granting permission to prosecute Mr. Pang on these charges.[10]

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[10] To summarize the record, Pet. App. 23a-48a, Brazil has denied the U.S. request for permission to charge Mr. Pang with the felony-murder charges *at least six times*: Brazil's Supreme Court twice, its Ministry of Foreign

Having reviewed the relevant international communications in this case, the Washington Supreme Court found as follows:

> We conclude from the record in this case that Brazil has not expressly consented to nor implicitly or explicitly waived objection to the State of Washington charging [Mr. Pang] with murder in the first degree.

Pet. App. 54a-55a.

C. The Standing-Without-Protest Circuit Split Does Not Apply to Charges For Which Extradition Was Expressly Requested and Denied

Since Brazil has the right under the Treaty to say no to the four felony-murder charges requested in the U.S. Extradition Petition, and has in fact done so, U.S. federal law is unequivocal that Mr. Pang has standing to object to post-extradition prosecution on these charges.[11]

Had the facts been different in this case—had Brazil, for instance, been silent[12] or ambiguous[13] on whether it deemed the four felony-murder charges extraditable under the

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Affairs once, its Justice Ministry twice, and its President once.

[11] *See, e.g.*, *Najohn*, 785 F.2d at 1422 ("However, the person extradited may raise whatever objections the rendering country might have.") (citing *Rauscher*, 119 U.S. at 419).

[12] *See Fiocconi*, 462 F.2d at 477 ("no response from the Italian government has yet been received [regarding the post-extradition New York charges]").

[13] *See United States v. Khan*, 993 F.2d 1368, 1374-75 (9th Cir. 1993) (reversing and dismissing conviction on one count, because the court refused to "*infer an agreement to extradite from Pakistan's silence*").

Treaty—this case might have afforded this Court an opportunity to expand on its recent comments in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), on the standing-without-protest question.

There, Chief Justice Rehnquist pointed out that the *Rauscher* Court assumed an individual extraditee has standing to challenge U.S. violation of an extradition treaty whether or not the extraditing country protests: "[N]o importance was attached to whether or not Great Britain had protested the prosecution of Rauscher for the crime of cruel and unusual punishment as opposed to murder." 504 U.S. at 667.[14]

Still, even if this Court were to reverse its landmark *Rauscher* decision on this point, Mr. Pang would nonetheless have standing to challenge his prosecution on the felony-murder charges. Brazil has made clear that it considers these four charges non-extraditable offenses under the Treaty, and has therefore repeatedly denied the United States permission to prosecute Mr. Pang on these charges. *Cf.* Pet. 9-10. Even circuits such as the Second and Fifth, which have questioned standing in cases where new charges were added post-extradition, would by their own reasoning hold that Mr. Pang has standing to object to the four felony-murder charges at issue here. The dispositive concern of these circuits is to give effect to the intent of the extraditing country. Here, Brazil's intent is clear.[15]

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[14] The Eleventh Circuit has, based on this, declared the standing-without-protest question answered. *United States v. Puentes*, 50 F.3d 1567, 1574-75 (11th Cir.), *cert. denied*, 116 S.Ct. 341 (1995).

[15] *See, e.g., Fiocconi*, 462 F.2d at 482 (2nd Cir.) ("[Under 18 U.S.C. §3192], a person who has been extradited should not be tried for an offense which the foreign country would consider to be outside the limits of its act of extradition"); *United States v. Kaufman*, 858 F.2d 994, 1009 (5th Cir.

II. HONORING AN EXTRADITING NATION'S RESTRICTIONS IS A PRINCIPLE EVEN MORE FUNDAMENTAL THAN THE RULE OF SPECIALTY AND ONE WITHOUT WHICH NO EXTRADITION TREATY WOULD MAKE SENSE

Having first sought to deny Mr. Pang standing to object to prosecution on the barred charges, Petitioner next seeks to convince this Court that, despite Brazil's no, the U.S. is under no obligation under the terms of this particular Extradition Treaty to honor Brazil's express conditions of extradition.

To accomplish this, Petitioner narrowly focuses attention on the language of Article XXI, which bars prosecution for "any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request." Petitioner then points to the U.S. request for Mr. Pang's extradition, and notes, "The murder charges were listed in that request." Pet. 18. Thus, by definition, they "gave rise to the request." Then comes Petitioner's surprising conclusion: "the State of Washington can prosecute Pang for the four counts of murder *because those offenses were listed in the extradition request*." Pet. 14 (emphasis added). Petitioner's formula thus neatly circumvents the fact that Brazil *denied* the request for extradition on those charges.

Petitioner's sophistry would not only render meaningless the extensive extradition proceedings conducted in Brazil's highest federal court, but would also void Brazilian officials' principled subsequent refusals to grant the U.S. what it so aggressively sought: permission to prosecute Mr. Pang on the

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1988), *reh'g denied*, 874 F.2d 242 (1989) (since there was "no basis to conclude" that the charges could offend the requested nation, "hence, this prosecution does not constitute a breach of the treaty provisions.").

four felony-murders that the Brazilian Supreme Court had ruled were non-extraditable offenses under the Treaty.

By force of logic, Petitioner's construction would also allow Brazil to disregard any extradition limitations imposed by the United States. Suppose, for instance, that Brazil petitioned the extradition of a physician on several charges, including four first-trimester abortions allegedly performed in Rio de Janeiro. Although abortion is an extraditable offense under Article II of this 1960s Treaty, *see* Pet. App. 108a, Art. II, §2, and remains a serious crime in Brazil, it has since been ruled constitutionally protected behavior in the United States. *See, e.g., Roe v. Wade*, 410 U.S. 113, *rehg. den.*, 410 U.S. 959 (1973). Were the United States to grant extradition on the other charges, but to exclude from the grant of extradition the four abortion counts on grounds that the dual criminality requirement in Article I of the Treaty had not been satisfied, the U.S. would surely expect Brazilian courts to uphold its decision and not allow post-extradition prosecution on the abortion charges. Under Petitioner's out-of-context construction of Article XXI, however, Brazil would be free to disregard the United States' Extradition Order.

At the very least it is clear that Brazil, as the other party to this international agreement, does not share Petitioner's views. Brazil's 1988 Constitution gives its highest judicial body original and exclusive jurisdiction over all extraditions. Pet. App. 27a, 41a. Had Brazil's Justices believed their determination of the extraditability of each of the five petitioned charges in this case would have no legal consequence in the U.S., they need not have wasted their time. Indeed, if Petitioner's construction were adopted, what reason would Brazil's high court have to review future U.S. petitions for extradition? More importantly, why would the Brazilian Justices *grant* any U.S. extradition petitions,

knowing that the provisions of the U.S.-Brazil Extradition Treaty were being openly disregarded in American courts?

The fact is that Article XXI is only one of several provisions in the U.S.-Brazil Extradition Treaty affording both parties the right to deny extradition for certain offenses. Indeed, the Treaty's first article requires (1) that the principle of dual criminality be met and (2) that the offense for which extradition is requested be listed among the extraditable offenses in Article II. Neither of these two primary Treaty requirements was satisfied in this case. Brazil was therefore within its Treaty rights to deny extradition on the four felony-murder charges, and the U.S. cannot now violate Brazil's ruling. In the words of the Washington Supreme Court,

> Under all the established facts in this case and the application of international law, treaty law, United States law, Washington law, and common logic, we must give good faith recognition to the lawful determination of the Federal Supreme Court of Brazil, the highest court of that sovereign democracy, that Petitioner Martin Shaw Pang was extradited only for prosecution in the State of Washington for the crime of arson in the first degree, resulting in four deaths, but not for prosecution for the four charges of murder in the first degree.

Pet. App. 71a-72a.

CONCLUSION

The Washington Supreme Court has simply enforced United States compliance with the provisions of this country's decades-old treaty with Latin America's largest sovereign democracy. Federal case law is uniform that the United States must honor whatever restrictions are imposed by an

extraditing nation. This principle of extradition law is axiomatic and should not be called into question by this Court. Brazil has said no to the four felony-murder charges requested and certainly has every right to presume that American courts will give its Treaty-based decision the good faith recognition it deserves. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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